ATTORNEYS FOR APPELLANT:

FRED R. HAINS
PETER M. YARBRO
Hains Law Firm, LLP
South Bend, Indiana

ATTORNEY FOR APPELLEES:

ROBERT J. PALMER
May Oberfell Lorber
Mishawaka, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEPHEN J. ENGEL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 50A05-0512-CV-718
	)	
THE STRANG FAMILY TRUST,	)	
EARL STRANG and DONNA-BELLE STRANG,	)	
Individually,	)	
	)	
Appellees-Respondents.	)	

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0205-PL-12

January 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Stephen J. Engel appeals partial summary judgment in favor of Earl Strang, Donna-Belle Strang, and the Strang Family Trust (collectively, "the Strangs"). Engel argues his purchase of two parcels from the Strangs included a right of first refusal on a third parcel. Because the parties did not agree on the extent of the third parcel, no contract was formed with respect to the right of first refusal. Thus, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

In the fall of 2000, Engel sought to purchase two ten-acre parcels from the Strangs as well as a right of first refusal on a third ten-acre parcel ("the north parcel") located north of the other two parcels.[2] A ditch with an easement was located north of the north parcel.

During October and November, the parties exchanged offers and counteroffers.[3] Engel's original offer on October 20 included the following: "1st refusal on additional property (north portion up to drainage ditch)." (App. at 80.) The Strangs' counteroffer specified "20 acres only – no first right on north 10 acre property." (*Id.* at 81.) Engel's offers on October 27, November 1, and November 7, each included this condition: "Purchaser shall have right of 1st refusal on North parcel of land up to ditch." (Ex. 1.) The counteroffer on October 31 stated: "Parcel does not go to ditch at north end." (Supp. App. at 35.) The counteroffers on November 10 and November 13 did not mention the

---

[1] The Strangs argue Engel's appeal should be dismissed because he failed to timely file his appellant's brief. We denied the Strangs' earlier request for dismissal. Because we prefer to decide cases on the merits, we decline to reconsider our earlier ruling.

[2] Engel intended to use the land for a private airstrip and home.

[3] The parties' realtors used offer (purchase agreement) and counteroffer forms supplied by the North Central Indiana Association of Realtors.

right of first refusal.[4] The counteroffer forms provided: "All other terms of the Purchase Agreement (attached) shall remain unchanged." (Ex. 1.)

On November 15, Engel offered the Strangs $57,500 for the two parcels, payable in two installments. The offer stated: "Purchaser shall have right of 1st refusal on North Parcel of land up to ditch." (App. at 57.) The Strangs' counteroffer on November 16 changed the date of the closing on the second parcel and stated: "Parcel to North does not go to ditch." (*Id.* at 58.) Engel signed Strangs' counteroffer on November 17, 2001.

In May 2002, Engel filed a complaint seeking, *inter alia*, a declaratory judgment regarding the right of first refusal on the north parcel. Both parties moved for summary judgment. After a hearing, the trial court granted partial summary judgment in favor of the Strangs. The court's order provided:

> 1. There is no material issue of fact in dispute regarding Count I of the Plaintiff's Verified Complaint filed on May 8, 2002. The issue involved is strictly a matter of law and ripe for determination.
>
> 2. As part of the purchase of two (2) other parcels of real estate, Engle requested a right of first refusal on a third parcel. In all prior negotiations, the Strangs did not accept any terms which include that right on the other parcel. In the final offer, the request for the right of first refusal extended to land not owned by the Strangs. The Strang's [sic] counter did not mention the right but stated that the "Parcel to North does not go to ditch".
>
> 3. I cannot construe the above statement as an acceptance by the Strangs of Engel's offer for a right of first refusal on only the property that they owned when taking into account all prior negotiations in addition to the wording placed on the counter offer.
>
> 4. There is no right of first refusal on the subject 10.09 acre parcel.
>
> **IT IS THEREFORE ORDERED** that there was no acceptance of the [sic] Engel's offer for a right of first refusal on the 10.09 acre parcel

[4] These counteroffers focused on which party would pay various fees and when payments would occur.

> noted as Parcel 3 on Plaintiff's Exhibit 6 attached to the Plaintiff's Motion for Partial Summary Judgment. Consequently, no right of first refusal exists for that property.

(*Id.* at 1-2.)

After we declined to accept jurisdiction over Engel's interlocutory appeal, the remaining counts of his complaint were tried to the bench.[5] Engel now appeals the partial summary judgment against him.

DISCUSSION AND DECISION

When reviewing a grant or denial of summary judgment, we apply the same standard the trial court does. *Rogier v. Am. Testing & Eng'g Corp.*, 734 N.E.2d 606, 613 (Ind. Ct. App. 2000), *trans. denied* 753 N.E.2d 8 (Ind. 2001). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). We do not weigh the evidence; rather, we consider the facts in the light most favorable to the nonmovant. *Rogier*, 734 N.E.2d at 613.

Generally, the construction of a written contract is a question of law for which summary judgment is particularly appropriate. *City of Lawrenceburg v. Milestone Contractors, L.P.*, 809 N.E.2d 879, 883 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 978 (Ind. 2004). However, if the terms of a written contract are ambiguous, it is the responsibility of the trier of fact to ascertain the facts necessary to construe the contract. *Id.* Consequently, if summary judgment is granted based on the construction of a written

---

[5] The parties did not provide us with the exact nature of these claims; however, judgment was in favor of the Strangs.

contract, the trial court has determined as a matter of law either that the contract is not ambiguous or uncertain, or that any ambiguity can be resolved without the aid of a factual determination. *Id.* When the court construes a written contract as a matter of law, our standard of review is *de novo*. *Allstate Ins. Co. v. Bradtmueller*, 715 N.E.2d 993, 996 (Ind. Ct. App. 1999), *trans. denied* 735 N.E.2d 228 (Ind. 2000).

Unambiguous language in a contract is conclusive on the parties to the contract and on the courts. *Id.* If the language of the instrument is unambiguous, the intent of the parties is determined from the four corners of that instrument. *Id.* If, however, a contract is ambiguous or uncertain, its meaning is to be determined by extrinsic evidence and its construction is a matter for the fact-finder. *Id.*

In interpreting a written contract, we attempt to determine the intent of the parties at the time the contract was made as evidenced by the language used to express their rights and duties. *Id.* The contract is to be read as a whole and we will construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless. *Id.* An interpretation of the contract that harmonizes its provisions is favored over one that causes the provisions to conflict. *Id.*

The formation of a contract involves both offer and acceptance.

> It is well settled that in order for an offer and an acceptance to constitute a contract, the acceptance must meet and correspond with the offer in every respect. This rule is called the "mirror image rule." An acceptance which varies the terms of the offer is considered a rejection and operates as a counteroffer, which may be then accepted by the original offeror.

Martinez v. Belomonte, 765 N.E.2d 180, 183 (Ind. Ct. App. 2002), *reh'g denied*. A "meeting of the minds" on all essential elements or terms is necessary to form a binding

contract. *Ind. Dept. of Correction v. Swanson Servs. Corp.*, 820 N.E.2d 733, 737 (Ind. Ct. App. 2005), *reh'g denied, trans. denied* 841 N.E.2d 180 (Ind. 2005).

The parties agree Engel's November 15 offer and the Strangs' November 16 counteroffer Engel accepted together form the contract at issue. We conclude the contract did not include a right of first refusal because there was no meeting of the minds on the parcel subject to the right.

The November 16 counteroffer addressed three issues. Engel offered the Strangs $57,500 for twenty acres of land along Spruce Trail. The Strangs' counteroffer referred to "20 Acres +/- on [deleted word] Trail, Spruce." (Ex. 1.) Engel proposed paying half of the purchase price in December 2000 and the second half by August 2001. The Strangs' counteroffer required the second parcel to close on or before May 1, 2001. Finally, Engel's offer included: "Purchaser shall have right of 1st refusal on North parcel of land up to ditch." (*Id.*) The Strangs' counteroffer stated, "Parcel to north does not go to ditch." (*Id.*) No other terms were altered by the counteroffer.

While the Strangs' counteroffer is not an explicit rejection of Engel's request for a right of first refusal, it is clear the parties did not agree on the parcel on which the right of first refusal would be granted.[6] Because there was no meeting of the minds, no contract was formed regarding the right of first refusal. Consequently, we affirm.

Affirmed.

RILEY, J., and BAILEY, J., concur.

---

[6] The October 31 counteroffer stated the north parcel did not go up to the ditch. However, Engel continued to include the phrase "up to the ditch" in subsequent offers.